BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JAMES C. KLUCAS Claimant	)	
VS.	)	
SOLOMON CORPORATION Respondent	)	Docket No. 1,016,956
AND	)	
LIBERTY MUTUAL INSURANCE CO. Insurance Carrier	)	

ORDER

Claimant requested review of the January 18, 2006, Award by Administrative Law Judge (ALJ) Bryce D. Benedict. The Board heard oral argument on April 11, 2006.

APPEARANCES

Tamara J. Collins, of Wichita, Kansas, appeared for the claimant. James K. Blickhan, of Kansas City, Missouri, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award, except that Stipulation No. 2 contains a typographical error. The reference to a 2005 accident should be read as 2003.[1] The parties further agreed during oral argument to the Board that in the event the Board finds this claim compensable, the Board could decide the issues not decided by the ALJ and not remand those issues to the ALJ for a determination.

[1]Claimant's Form K-WC E-1 Application for Hearing filed May 18, 2004, alleges a date of accident as "4/14/3 and aggravated each and every workday thereafter."

ISSUES

The ALJ found that claimant failed to prove that written claim was timely as to the April 2003 accident, failed to prove he suffered a series of accidents, and failed to prove that notice as to a series was timely. Accordingly, the ALJ denied claimant's request for benefits.

The claimant argues that he suffered a series of accidents or repetitive injuries, that he gave proper notice to his employer of his initial injury and his repetitive injuries, and that his written claim was timely. He contends, therefore, that the ALJ erred in denying him benefits. Claimant asserts that his average weekly wage was $492 plus overtime and benefits and that he is entitled to a 90 percent work disability based on a 100 percent wage loss and an 80 percent task loss. Claimant also requests payment of authorized and related medical treatment expenses and specifically requests mileage reimbursement for travel to see Dr. Edward Prostic, which he did at the request of respondent, future medical, and unauthorized medical in the amount of $500.

Respondent admits that claimant suffered personal injury by accident on April 9, 2003, and that this accidental injury arose out of and in the course of his employment with respondent. Respondent also admits it received timely notice of that accident. However, respondent denies claimant thereafter suffered a series of accidents and contends that the ALJ correctly determined that claimant failed to make a timely written claim and, therefore, denied benefits. Accordingly, respondent requests that the ALJ's Award be affirmed in its entirety.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

This claimant has been before the Board previously on the question of whether claimant filed a timely written claim. The claimant argued that his initial injury was April 14, 2003,[2] and that because of his job duties, he aggravated his back each and every day he worked thereafter. Since he was arguing a series of accidents, he asserted that his written claim, filed on May 17, 2004, was timely because his last date of work was January 4, 2004.[3] Respondent argued that claimant had only one date of accident, in April 2003, and did not have a series of repetitive injuries; therefore, claimant's written claim was filed out of time. The ALJ made a preliminary determination that the written claim was not timely, that claimant

[2]Claimant seems to be unsure of the correct date of his original injury. In a review of the medical records, it appears that the correct date of claimant's initial injury was April 9, 2003.

[3]Again, claimant seems to be unsure of the exact date of his termination by respondent. At the Preliminary Hearing (June 15, 2004), claimant testified he was terminated January 27, 2004. At the Regular Hearing, claimant testified his termination date was March 23, 2004.

did not suffer a series of accidents, and that claimant's request for medical treatment should be denied. The Board member that decided the appeal from the ALJ's preliminary hearing Order affirmed the ALJ, stating: "[U]nder the facts as presented to the ALJ, the Board finds that the ALJ's conclusions are well founded and should not be disturbed."[4]

Claimant worked for respondent as a truck driver. He testified that at the times in question, he was earning $12.30[5] per hour and worked from 40 to 60 hours per week. He was paid time and a half when he worked overtime. He also testified that his benefits included vacation days, personal days, and profit sharing. He did not know the value of his fringe benefits but when asked how much the respondent paid into his profit sharing plan, he said, "you put in ten, they put in 40."[6] Claimant seeks a determination of his average weekly wage (AWW) but does not state what amount he is alleging: "We request an AWW of at least 492 [*sic*] plus overtime and benefits."[7] Respondent likewise failed its obligation to provide the court with figures for claimant's preinjury gross AWW and failed to provide a wage statement as required by K.A.R. 51-3-8(c).

On or about April 9, 2003, claimant was placing a tarp on a truck when the rope he was pulling on broke and he fell backwards. He claimed injuries to his back, neck and hip. On Saturday, April 12, he called his personal physician, Dr. James Dennis Biggs, and requested pain medication because his back was hurting him. On Sunday, April 13, his pain was worse, and he went to the emergency room. Dr. Biggs saw him at the emergency room and took him off work. After claimant's emergency room visit, he talked to his supervisor, Scott Carney, and told him about his accident at work and the resulting injuries. On Monday, April 14, Mr. Carney went to claimant's home and filled out an accident report. Claimant testified he never received a copy of that accident report.

Respondent did not authorize a treating physician, and claimant continued to see Dr. Biggs. On April 22, 2003, respondent authorized claimant to see Dr. W. Reese Baxter. Dr. Baxter provided no treatment for claimant but authorized him to return to work. Dr. Biggs also released claimant to return to work on April 22, 2003.

Claimant returned to work for claimant and continued to work until he was terminated in January 2004. After his return to work, he said he could no longer drive a truck for long periods, load or unload trailers, tarp or untarp a trailer, or change oil on the truck. When he attempted any of these tasks, he would hurt his back again. He testified that every time he hurt his back again, he would tell Mr. Carney. On several occasions, he had to take off work

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[4] *Klucas v. Solomon Corporation*, No. 1,016,956, 2004 WL 2382729 (Kan. WCAB Sept. 2, 2004).

[5] Claimant testified in the Preliminary Hearing that he earned $12.20 per hour. He testified at the Regular Hearing that he earned $12.30 per hour. He told Terry Cordray that he earned $11.30 per hour.

[6] R.H. Trans. at 24.

[7] Claimant's Appeal Brief (Feb. 16, 2006) at 4.

because of the pain caused by the work he was doing. Eventually respondent allowed him to continue driving a truck, but someone else came along with him to help him.

Claimant was told that he was being terminated because he could no longer perform his job duties. After he was terminated, he looked for jobs at Bailey Truck Line, Hostetter Trucking, and Chuck Henry's Trailer Sales. All of those businesses rejected him because he had been hurt. Those were the only places claimant looked for work. Claimant believes he made a good faith effort to find employment. Claimant carries a cane and said he started carrying it soon after his original injury and was using it before he was terminated. He was using the cane at the times he inquired about jobs with Bailey, Hostetter and Chuck Henry's. He uses the cane to keep his balance and relieve the pain on his left side.

Between claimant's return to work in April 2003 and his termination in January 2004, he continued to see his personal physician. Dr. Biggs testified that on April 13, 2003, at the emergency room, claimant described an accident where he was pulling a rope and fell. This was the only accident claimant ever described to Dr. Biggs. Dr. Biggs treated claimant conservatively with medication. On August 5, 2003, claimant again visited Dr. Biggs complaining of right low back pain. At that time, Dr. Biggs diagnosed claimant with low back strain and osteoarthritis of the back. He said the osteoarthritis would have preexisted claimant's accident of April 2003. Claimant, during this visit, did not relate specifically what activity he had been doing that made his back pain flare-up. When Dr. Biggs next saw claimant on April 13, 2004, claimant had been terminated by respondent and was complaining of back pain over the last several months. Dr. Biggs last saw claimant concerning his low back pain on April 27, 2004, at which time claimant told him he was significantly better.

Dr. Biggs testified that claimant's job activities aggravated his back condition. He further believed that claimant could still drive a truck but did not know anything about rolling transformers and would not comment on whether claimant could still do that. He also testified that he had not treated claimant for any back problems before the April 2003 accident.

Claimant testified that since Dr. Biggs only gave him pain medication, he then went to see Dr. Sean Herrington. Dr. Herrington referred him to Dr. Ali Manguoglu. Dr. Manguoglu is a board certified neurosurgeon, and he first saw claimant on August 31, 2004. Claimant reported that he initially had total spine pain after the April 2003 accident, and the pain settled in his neck, the left side of his back, and his left leg.

Dr. Manguoglu found no evidence of spinal cord involvement. Claimant had normal reflexes in the upper and lower extremities. Straight leg raising was positive about 80 degrees on the left side, negative on the right side. Claimant's neck and back motions were restricted. There was no muscle twitching or shriveling. He had diminished sensation to pinprick in both legs, distally. Dr. Manguoglu diagnosed him with neck and back pain with left-sided sciatica and numbness and tingling in the extremities, secondary to advanced

lumbar spinal stenosis due to spondylosis. He ordered physical therapy. Dr. Manguoglu said claimant's degenerative changes in the lumbar and cervical spine would have occurred over time and have existed before April 2003.

Dr. Manguoglu saw claimant one more time on October 11, 2004, for follow up after physical therapy. Claimant was doing better, and Dr. Manguoglu did not recommend surgery. More physical therapy was ordered, and claimant was told to come back if his symptoms became worse. Dr. Manguoglu has not seen claimant since that date.

Dr. Manguoglu believed that claimant was injured in the course of his employment. He further opined that claimant's task loss was 100 percent, after reviewing Jerry Hardin's task list. However, when asked task-by-task, Dr. Manguoglu admitted that claimant was able to perform some of the duties on the task list. On cross-examination, Dr. Manguoglu said that claimant could do 7 of the 16 tasks on Form A of Mr. Hardin's list. Dr. Manguoglu was not asked about task No. 14 on Form B of Mr. Hardin's list, which was the only nonduplicative task on Form B. Accordingly, out of the 17 nonduplicative tasks identified by Mr. Hardin, Dr. Manguoglu said claimant could no longer perform 9, for a task loss of 53 percent.

Dr. Manguoglu did not put any specific restrictions on claimant but restricted claimant from his job as a truck driver because the job would aggravate the severe arthritis in his back and neck. He believed that claimant's job tasks and duties after his original injury aggravated his back on a daily basis. Continuing to drive a truck, put the tarps on, and repair and change tires would continue to aggravate his condition. Dr. Manguoglu described "aggravate" as "additional microtraumas in his spine by doing that type of job on a day-to-day basis, and he will have increase in pain."[8] He said that claimant has a "typical trucker's or farmer's back."[9]

Dr. Pedro Murati, a board certified independent medical examiner, examined claimant on April 11, 2005, at the request of his attorney. After examining claimant, Dr. Murati diagnosed claimant as having low back pain secondary to symptomatic degenerative disc disease with signs of radiculopathy and myofascial pain syndrome of the shoulders and neck. Dr. Murati recommended permanent restrictions of no climbing ladders, crawling, or above shoulder level work with both arms. Lifting, carrying, pushing or pulling should be limited to 10 pounds, 20 pounds occasionally. Claimant should rarely bend, crouch, stoop, climb stairs, and squat. Claimant could frequently sit, stand, walk and drive but should alternate sitting, standing and walking. Claimant should not work more than 24 inches away from the body and should avoid awkward positions of the neck. Dr. Murati testified that these restrictions are causally related to claimant's work injury.

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[8]Manguoglu Depo. at 19.

[9]*Id.* at 20.

Using the AMA *Guides*[10], Dr. Murati gave claimant a 10 percent rating for the low back pain secondary to radiculopathy and a 5 percent rating for myofascial syndrome affecting the cervical paraspinals. Dr. Murati combined those, giving claimant a 15 percent whole person impairment.

Dr. Murati reviewed the task list prepared by Mr. Hardin and said that he agreed with Mr. Hardin's indications of which jobs claimant could and could not do. From a review of Mr. Hardin's list, there are 17 nonduplicative tasks. Murati indicated that claimant was unable to do 10 of those 17 tasks, which would calculate to a 59 percent task loss.

Dr. Murati opined that claimant's activities as outlined in Mr. Hardin's task list could have aggravated claimant's condition on an each and every day basis. He testified that the claimant had an initial injury and if he continued working without restrictions, that would have consistently aggravated this condition of his neck and back throughout all that time. However, claimant did not return to his regular job duties without any restrictions or accommodations. Claimant testified that he self-limited and also was at least partially accommodated by respondent providing a helper. As both Dr. Manguoglu's and Dr. Murati's opinions of there being a series of aggravations are premised on the assumption that claimant returned to his prior unaccommodated job duties, those opinions are without proper foundation and are disregarded. Accordingly, the Board finds that claimant suffered a single traumatic accident and injury on April 9, 2003.

Dr. Edward Prostic, a board certified orthopedic surgeon, saw claimant on October 17, 2005, at the request of respondent. Claimant gave a history of a single event, April 2003, and did not tell him about a series of events or traumas. Claimant complained of low back pain which worsens with prolonged sitting, standing, walking, bending, squatting, twisting, lifting, pushing and pulling. Dr. Prostic concluded that claimant sustained an injury to his low back in April 2003 and that claimant also has severe degenerative disc disease of his low back. Dr. Prostic believes that claimant is capable of returning to light/medium level employment, avoiding forceful pushing or pulling or frequent bending or twisting at the waist. Claimant also should not sit more than 45 minutes continuously or stand more than 30 minutes without changing positions.

Dr. Prostic said that claimant's degenerative disease is plain old wear and tear changes, not uncommon for a man of his age. He also said that claimant's degenerative disease would have pre-dated his April 2003 injury. Dr. Prostic rated claimant as having a 15 percent functional disability to the body as a whole based on the AMA *Guides*.

Dr. Prostic reviewed the task lost list prepared by Terry Cordray. On the signed report, Dr. Prostic marked 3 of the 15 items as being tasks claimant could no longer perform.

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[10]American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

In his deposition, however, he named only 2 items as tasks that claimant could no longer perform, which is a 13 percent loss.

Jerry Hardin, a personnel consultant, saw claimant at the request of his attorney on February 16, 2005. He and claimant discussed claimant's job tasks for the 15 years before claimant's initial injury and prepared a list setting out those tasks. Claimant was 59 years old at the time of his original injury and only has an eighth grade education, no GED, and has been a truck driver all his life. When claimant came in, he was using crutches or a cane. Mr. Hardin opined that claimant has a 100 percent wage loss and is essentially and realistically unemployable. His potential post-injury wage earning capability is zero. When he saw claimant, claimant was on Social Security disability. He did not ask claimant whether he was actively looking for a job but said that it would be difficult for a person of claimant's age, education and job skills to find employment.

Terry Cordray is a vocational rehabilitation counselor who visited with claimant on August 19, 2005, at the request of respondent. Together they prepared a list of 15 separate job tasks claimant performed during the 15 years before his injury. Claimant told him he was making $11.30 per hour plus health insurance and a 401K savings plan. Mr. Cordray did not know the value of claimant's fringe benefits.

When Mr. Cordray saw claimant, claimant was not working and had not placed any applications for any jobs. Mr. Cordray opined that claimant did not make a good-faith effort to find employment. Claimant was not registered with a job service agency or an employment office, and had not contacted the State vocational rehabilitation office. Mr. Cordray believed claimant could perform occupations such as a retail sales clerk or cashier. Those jobs pay, realistically, $7.50 per hour. Also, since Dr. Manguoglu said claimant could operate a bobcat, Mr. Cordray felt claimant could operate a bobcat or a tractor or get a job as a light truck delivery driver. These jobs earn from $11.80 to $12.70 per hour. Claimant does have a commercial driver's license. Mr. Cordray thought claimant could also be a school bus driver, which would pay $10.36 per hour.

Claimant's wife testified at the Preliminary Hearing and at the Regular Hearing concerning the issue of notice and a written claim. Her testimony at the Regular Hearing was virtually the same as it had been at the Preliminary Hearing. Mrs. Klucas testified she helps claimant with his paperwork because he is hard of hearing. She testified she received a written claim form from the State within a month after claimant reported his April 2003 workers compensation injury. She filled the form out, mailed it back to the State, and gave the respondent's part to the claimant to take to respondent. She does not have a copy of the form she mailed to the State or what she sent with claimant to take to the respondent. She did not mail the form by certified mail, nor was she with claimant when he took the form to respondent. Unfortunately, claimant was not asked what he did with the claim form that his wife filled out and gave him to take to respondent. The administrative file for this claim does not contain any writing or claim form from claimant or claimant's wife. The first document in

the administrative file is the May 17, 2004, letter from claimant's counsel which accompanied the Application for Hearing filed on May 18, 2004.

At the Preliminary Hearing, claimant's counsel stated: "[I]f we could take possibly his boss's deposition and try to get a copy of his employment file there may be one [written claim] in there."[11] But the record does not contain a deposition of any of claimant's supervisors at respondent, nor does it otherwise contain respondent's personnel file on claimant. Therefore, it is not known if the written claim form that claimant's wife sent with claimant was contained therein, or if the personnel file contained some other writing evidencing claimant's demand for workers compensation benefits. Accordingly, in the absence of proof that claimant served respondent with a written claim for compensation within 200 days after his April 9, 2003, accident, or within 200 days of the last payment of medical compensation to or on behalf of claimant, this claim is barred by K.S.A. 44-520a (Furse 2000).

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bryce D. Benedict dated January 18, 2006, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of April, 2006.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Tamara J. Collins, Attorney for Claimant
James K. Blickhan, Attorney for Respondent and its Insurance Carrier
Bryce D. Benedict, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

[11]P.H. Trans. (June 15, 2004) at 27.